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No. 75-1869

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALFRED F. CHITTENDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 530 F. 2d 41. The opinion of the district court (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on April 15, 1976. A petition for rehearing (Pet. App. D) was denied on May 26, 1976. The petition for a writ of certiorari was filed on June 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was a person required to file annual labor organization reports under 29 U.S.C. 436.

2. Whether the district court properly denied petitioner's timely motion for judgment of acquittal.

3. Whether the trial court properly refused to give certain requested special instructions to the jury.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on eight counts of willful failure to maintain proper records supporting annual labor organization reports (Forms LM-2) required by 29 U.S.C. 431(b) to be filed with the Secretary of Labor, in violation of provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 436 and 439(a). He was sentenced to pay fines of $5,000 each on four of the counts and of $2,500 each on the other four counts, for a total of $30,000, and was placed on probation for two years.[1]

The evidence is not in dispute. It established that petitioner, who served as president of Local Union 1418 and as secretary-treasurer of Local Union 1833, General Longshore Workers, International Longshoremen's Association,[2] had received expense payments from the labor organizations but had failed to file receipts for expenditures, vouchers, or minutes of executive board authorizations of such expenditures, as required by 29 U.S.C. 436.

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[1]The jury acquitted petitioner on 35 counts of embezzlement, and a mistrial was declared as to 27 remaining counts of embezzlement as to which the jury was unable to reach a unanimous verdict.

[2]In addition, petitioner was the vice president of the International Longshoremen's Association and a senior member of the Executive Board of the South Atlantic Gulf Coast District of the International Longshoremen's Association (Tr. 1397).

ARGUMENT

1. 29 U.S.C. 431(b) provides that "[e]very labor organization shall file annually with the Secretary [of Labor] a financial report signed by its president and treasurer" containing certain information. Section 436 provides that "[e]very person required to file any report * * * shall maintain records on the matters required to be reported * * *," and Section 439(a) provides that "[a]ny person who willfully violates this subchapter" shall be punished as provided. Petitioner argues that only a labor organization is required to file reports under Section 431(b), and that therefore only a labor organization—not an individual like himself—can be a "person" required to maintain records under Section 436. The capstone of the argument is that only a labor organization can be a "person" under Section 439(a) for purposes of violating the Act.

As the courts below noted, petitioner's position ignores 29 U.S.C. 439(d). Section 439(d) provides that "[e]ach individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false." Thus a union president or treasurer would be personally responsible under Section 439(d) for the union's failure to file the financial report required by Section 431(b), and as such would be a "person required" to file the report for the purpose of the recordkeeping requirement of Section 436. Petitioner's contrary construction imputes to Congress the intent to fix responsibility upon identified individuals for the failure to file the required reports, but to leave a gap in the responsibility for maintaining the records necessary to insure that such annual filings are not fraudulently or erroneously made. Congress plainly did not intend to create such an anomalous

situation; indeed, the legislative history of the statute indicates that Congress intended to affix both individual and organizational accountability for failure to maintain records and file reports. See S. Rep. No. 187, 86th Cong., 1st Sess. 10 (1959).

By virtue of his union offices, petitioner was required by 29 U.S.C. 431(b) to sign the unions' annual financial reports and was therefore personally accountable under Section 439(d) for their filing. *United States* v. *Ottley*, 509 F. 2d 667, 672 (C.A. 2); see also *United States* v. *Budzanoski*, 462 F. 2d 443, 452 (C.A. 3). Thus, he was punishable criminally for the willful failure to maintain the underlying records required by the statute to be kept. *United States* v. *Budzanoski, supra*, 462 F. 2d at 450-452; *United States* v. *Ottley, supra*.[3]

2. There is accordingly no merit in petitioner's companion contention that the trial court erred in refusing to instruct the jury that Section 431(b) "place[s] a duty on the labor organization itself, as opposed to specific individuals, to file the reports referred to therein," and that it was the labor organizations' duty to maintain the underlying records (Pet. 4). By suggesting that the duties to file and maintain records lay solely with the labor organization, petitioner's requested special charge ignores the plain language of Section 439(d) and misstates the law. A trial court has no duty to give an erroneous instruction. Cf. *United States* v. *Erlenbaugh*, 452 F. 2d 967, 973 (C.A. 7), affirmed, 409 U.S. 239.

[3]Since only willful failures to maintain such records are punishable under 29 U.S.C. 436, there is no danger (as petitioner supposes, Pet. 16-17) that innocent recordkeeping omissions will result in criminal sanctions.

3. Petitioner contends that the district court erred in refusing to grant his motion for judgment of acquittal on the theory that he allegedly relied in good faith upon a 1970 examination of certain union records by Labor Department Compliance Officer Victoria that revealed no irregularities. While good faith reliance upon an expert's advice, based on full disclosure by the defendant and a complete examination of the records, may be asserted to negative criminal intent (*Bursten* v. *United States*, 395 F. 2d 976 (C.A. 5); cf. *United States* v. *Cox*, 348 F. 2d 294, 296 (C.A. 6)), the prerequisites for the defense were conspicuously absent in this case.

Compliance Officer Victoria testified that he conducted only a superficial examination of the records of Local 1833 for specific shortcomings in that union's affairs, rather than a complete financial examination (Tr. 1230, 1233-1234). He received and reviewed only selected records from Local 1833. He was not furnished check stubs or minutes of executive board meetings (Tr. 1216, 1218-1221).[4] Victoria's failure to discover recordkeeping deficiencies in the course of his cursory examination of Local 1833's affairs falls far short of the advice of lawfulness, given after full disclosure of all relevant facts, that may justify a good faith reliance defense to a criminal prosecution. See *United States* v. *Oates*, 467 F. 2d 129 (C.A. 3), certiorari denied *sub nom. Miller* v. *United States*, 410 U.S. 909; *United States* v. *Cox, supra*; *United States* v. *Bath*, 504 F. 2d 456 (C.A. 10). Moreover, in the course of a more intensive

[4]Petitioner's failure to keep minutes of executive board meetings (Tr. 65) was among the recordkeeping violations for which petitioner was convicted.

examination in 1962, Compliance Officer Ryan had informed petitioner of the requirements of Section 436 and had specifically apprised him that minutes, expense authorizations, and expense receipts must be maintained in order to comply with the statute (Tr. 449-460). Accordingly, the trial court correctly denied petitioner's motion for judgment of acquittal.[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]Nor was it error for the district court to refuse to give petitioner's requested instruction (Pet. 3, para. 3) concerning the jury's ability to consider Victoria's examination in determining the willfulness of petitioner's failure to maintain the necessary records. Petitioner does not contend that the district court's instructions regarding willfulness were deficient in any way, or that the court prevented him or restricted him in any way from arguing directly to the jury that it should infer a lack of willfulness on his part in light of Victoria's examination. Petitioner cites no authority, and we know of none, for the proposition that the district court must instruct the jury as to every possible inference that might permissibly be drawn from every item of evidence introduced at trial.